Badruzamani bin Azmi v Kurnia Insurance (M) Bhd

HIGH COURT (KANGAR) — CIVIL APPEAL NO 12–01 OF 2000
VINCENT NG J
5 JUNE 2001

Civil Procedure *— Parties — Intervention — Application to intervene — Failure to adhere to rules — Order 6 r 2(b) (1) of the Rules of the High Court 1980 could only apply to plaintiff or co-defendant and not intervener — Whether application must fail on this ground alone*

Civil Procedure *— Parties — Intervention — Application to intervene — Vehicle insurer's liability — Liability contingent upon judgment obtained by claimant — Whether fraud could be pleaded during currency of proceedings between claimant and insured — Whether vehicle insurer could be made party to action between claimant and insured — Road Transport Act 1987 s 96(1)*

Civil Procedure *— Parties — Intervention — Application to intervene — Whether inordinate delay in filing application to be added as a party fatal*

Insurance *— Motor insurance — Parties — Vehicle insurer's liability — Liability contingent upon judgment obtained by claimant — Allegation of fraud — Whether insurer could be allowed to intervene in proceedings between claimant and insured — Road Transport Act 1987 s 96(1)*

The appellant/plaintiff was appealing against the decision of the learned sessions court judge who allowed the respondent insurer to be made a party to the proceedings as an intervener. It was a running down case and the respondent was the insurer for the defendant. During the course of the trial, the respondent lodged a police report alleging fraud in the accident on 10 January 1998 and after the plaintiff had closed his case, the respondent applied to be made a party as intervener on 20 February 1999. The respondent's supporting affidavit alleging fraud was based on talk by the villagers. The issues for determination were: (i) whether the respondent in particular (and other road vehicle insurer generally) could in law, considering the provisions of s 96(1) of the Road Transport Act 1987 ('the Act') be made a party to the running down proceedings; (ii) whether there had been an inordinate delay on the part of the respondent in filing the application to be added as a party ('intervener') in the proceedings, and if the delay was inordinate, the effect thereof; (iii) whether such applications, if at all tenable in law, ought to be framed as a prayer that the intervener be added as a co-defendant rather than as intervener; and (iv) whether particulars of fraud would have to be condescended to in an application grounded upon fraud.

Held, allowing the appeal:

(1) A vehicle insurer's liability under s 96(1) of the Act is contingent statutory liability — a liability wholly and exclusively created by

statute and contingent upon judgment obtained by the claimant. Thus, during the currency of the proceedings between the claimant and the insured, there are no issues — not even fraud — that could be pleaded or litigated until the strict liability provision under s 96(1) of the Act is triggered into operation upon conclusion of the trial. It would follow that as the liability of a vehicle insurer could be triggered off or set in motion only upon invocation of s 96(1) of the Act by the claimant in a negligence suit at the enforcement stage, it is neither within the province of nor permissible for the court to adjudicate on the status of the insurer's liability (through a finding on fraud) prior to enforcement of the judgment by the successful claimant in the suit. Hence, the respondent, as vehicle insurer, could not in law be made a party to the current action (see pp 487F–G, 488C–D, 490G).

(2) The respondent had delayed in making its application to the sessions court. It had allowed over a year to lapse before filing the application to be made 'an intervener' and, a fortiori, after the close of the plaintiff's case. This could probably be construed as a waiver on the respondent's part. Further, the respondent would seem to have admitted that there was delay, as it had not offered any riposte or answer to the appellant's submission on that score. As such, this court could not but to hold that there was inordinate delay and that the delay was fatal to the respondent's case (see p 492D–E).

(3) The relevant prayer in the application was for leave for the respondent 'to be made an intervener' in the action. This is fundamentally wrong as under O 6 r 2(b)(1) of the Rules of the High Court 1980 ('the RHC') one can only apply to be a plaintiff or co-defendant in an action rather than as an intervener. In the case at hand failure to ask to be added as a defendant was fatal and the application must fail on this ground alone (see p 492F–G).

(4) As the allegations of fraud contained in the respondent's supporting affidavit were based on talk by the villagers, the belief of the deponent was hearsay, vague and lacked particulars on the allegations of fraud. In this regards, reference must be made to O 41 r 5 of the RHC wherein 'statements of information or belief' may be used in interlocutory proceedings subject to the mandatory proviso that 'the sources and grounds thereof' are disclosed (see p 494C–E).

(5) It is a crucial requirement that the party who alleges fraud must condescend upon specific and sufficient particulars of fraud. The respondent's application was devoid of any disclosure of particulars on fraud, which makes the application itself untenable (see p 495C, G).

[Bahasa Malaysia summary

Perayu/plaintif merayu terhadap keputusan hakim mahkamah sesyen yang arif yang membenarkan penentang iaitu pihak penginsurans dijadikan satu pihak kepada prosiding sebagai pencelah. Ini adalah satu kes pelanggaran dan penentang adalah penginsuans defendan. Semasa perbicaraan berlangsung, penentang membuat satu laporan polis mendakwa fraud dalam perlanggaran pada 10 Januari 1998 dan selepas plaintif menutup kesnya, penentang memohon supaya dijadikan suatu pihak sebagai pencelah pada 20 Februari 1999. Afidavit sokongan penentang yang mendakwa fraud adalah berdasarkan cakap oleh penduduk kampung. Isu-isu untuk penentuan adalah: (i) sama ada penentang secara khusus (dan penginsurans kenderaan yang lain, pada amnya) boleh, di sisi undang-undang, memandangkan peruntukan s 96(1) Akta Pengangkutan Jalan 1987 ('Akta tersebut'), dijadikan suatu pihak kepada prosiding perlanggaran; (ii) kelewatan melampau pada pihak penentang dalam memfailkan permohonan untuk ditambah sebagai satu pihak ('pencelah') dalam prosiding, dan sekiranya kelewatan adalah melampau, kesan daripadanya; (iii) permohonan-permohonan sedemikian, sekalipun boleh dipertahankan dari segi undang-undang, seharusnya dirangkakan sebagai satu rayuan bahawa pencelah ditambah sebagai defendan bersama dan bukannya pencelah; dan (iv) butir-butir fraud harus dimaklumkan secara sukarela dalam satu permohonan yang berlandaskan fraud.

Diputuskan, membenarkan rayuan tersebut:

(1) Liabiliti penginsurans kenderaan di bawah s 96(1) Akta tersebut adalah liabiliti kontinjen berkanun — satu liabiliti yang diwujudkan secara keseluruhan dan eksklusif oleh kanun dan bergantung pada penghakiman yang diperolehi oleh pihak yang menuntut. Justeru itu, semasa perlansungan prosiding di antara pihak yang menuntut dan pihak yang diinsuranskan, tiada isu — tidak pun fraud — yang boleh diplidkan atau dilitigasikan sehingga peruntukan liabiliti yang tegas di bawah s 96(1) Akta tersebut dicetuskan untuk beroperasi apabila perbicaraan tamat. Ini bermakna bahawa oleh kerana liabiliti suatu penginsurans kenderaan boleh dicetuskan atau digerakkan hanya pada bangkitan s 96(1) Akta tersebut oleh pihak yang menuntut dalam satu guaman pada tahap penguatkuasaan, ia tidak berada dalam rangkuman atau dibenarkan untuk mahkamah menghakimi kedudukan liabiliti penginsurans (melalui satu keputusan ke atas fraud) sebelum penguatkuasaan penghakiman oleh pihak yang menuntut yang berjaya dlam guaman. Justeru itu, penentang, sebagai penginsurans kenderaan, tidak boleh dijadikan suatu pihak kepada tindakan ini di sisi undang-undang (lihat ms 487F–G, 488C–D, 490G).

(2) Penentang telah melengah dalam membuat permohonannya kepada mahkamah sesyen. Ia telah membenarkan tempoh lebih daripada setahun untuk berlalu sebelum memfailkan permohonan untuk dijadikan 'pihak pencelah' dan, a fortiori, selepas penghujung kes plaintif. Ini mungkin boleh ditafsirkan sebagai satu penepian pada pihak penentang. Seterusnya, penentang seolah-olah telah mengaku bahawa kelewatan telah berlaku, kerana ia tidak memberikan apa-apa tikam balas atau jawapan kepada hujah perayu berhubung perkara itu. Oleh yang demikian, mahkamah ini tiada pilihan kecuali memutuskan bahawa kelewatan yang melampau telah berlaku dan bahawa kelewatan tersebut adalah padah kepada kes penentang (lihat ms 492D–E).

(3) Rayuan yang relevan dalam permohonan ini adalah untuk kebenaran supaya penentang 'dijadikan pihak pencelah' dalam tindakan tersebut. Ini adalah salah pada dasarnya kerana di bawah A 6 k 2(b)(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') satu pihak hanya boleh memohon dijadikan plaintif atau defendan bersama dalam satu tindakan dan bukannya sebagai pihak pencelah. Dalam kes ini, kegagalan untuk meminta supaya ditambah sebagai seorang defendan adalah padah dan permohonan mestilah gagal atas alasan ini sahaja (lihat ms 492F–G).

(4) Oleh kerana tohmahan-tohmahan mengenai fraud yang terkandung dalam afidavit sokongan penentang adalah berdasarkan cakap oleh penduduk kampung, kepercayaan deponen adalah dengar cakap, samar dan butir-butir mengenai fraud kurang lengkap. Berhubung dengan ini, rujukan hendaklah dibuat kepada A 41 k 5 KMT dalam mana 'statements of information or belief' boleh digunakan dalam prosiding interlokutori tertakluk kepada proviso mandatori bahawa 'the sources and grounds thereof' dimaklumkan (lihat ms 494C–E).

(5) Adalah satu keperluan yang sangat penting bahawa pihak yang mendakwa fraud mesti sudi memaklumkan butir-butir mengenai fraud yang khusus dan mencukupi. Permohonan penentang adalah tanpa apa-apa pendedahan butir-butir mengenai fraud, yang menyebabkan permohonan itu sendiri tidak dapat dipertahankan (lihat ms 495C, G).]

Notes

For cases on intervention, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4208–4236.

For cases on motor insurance, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 197–298.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman [1986] 1 MLJ 426 (refd)
Carpenter v Ebblewhite & Ors [1939] 1 KB 347 (refd)
Dynacast (S) Pte Ltd v Lim Meng Siang & Ors [1989] 3 MLJ 456 (refd)
Gurtner v Circuit [1968] 1 All ER 328; [1968] QB 587 (refd)
Hari Singh v Sundaramal [1965] 2 MLJ 174 (refd)
Johannes Koplan v Aw Chen [1970] 1 MLJ 220 (refd)
Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303 (refd)
Koh Ai Heah (P) v Leeco Realty Sdn Bhd [1997] MLJ 324 (refd)
Mohd Yusof Mohamad v Electrolux Home Centers Sdn Bhd [1999] 2 CLJ 866 (refd)
Nana Ofori Atta II v Nana Abu Bonsra II [1957] 3 All ER 559 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)
QBE Insurance Ltd v Hashim bin Abdul & Anor [1981] 2 MLJ 275 (refd)
Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV & Ors (No 2) [1998] All ER 975 (refd)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143 (refd)
Tan Kiaw v Gan Chye Khoon [1983] 2 MLJ 109 (refd)
Teng Suay Ba & Anor v Yeo Kee Aik [1993] 4 CLJ 95 (refd)
Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668 (refd)
Wallingford v Mutual Society (1880) 5 App Cas 685 (refd)
Wan Othman bin Datuk Wan Yusof v Kewangan Utama (M) Bhd [1993] 2 CLJ 572 (refd)
Wee Choo Keong v MBf Holdings Bhd and another appeal [1995] 3 MLJ 549 (refd)
Wycherley v Andrew (1871) LR 2 P & D 327 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(a)
Road Transport Act 1987 s 96(1), (2)(a)
Rules of the High Court 1980 O 6 r 2(b)(1), O 41 r 5(2)
Subordinate Court Rules 1980 O 8 r 6(2)(b), O 25 r 26(2), O 49 r 2(2)

Appeal from: Summons No 53–08 of 1997 (Sessions Court, Kangar)

SH Ranjit Singh (*SH Ranjit Singh & Co*) for the appellant.
N Sivananthan (*Sivananthan*) for the respondent.

Vincent Ng J. : Before me is an appeal by the appellant (the plaintiff in the court below) lodged pursuant to O 49 r 2(2) of the Subordinate Court Rules 1980 ('the SCR'), against the decision of the learned sessions court judge

on 3 March 2000 allowing the respondent to be made a party to the proceedings as an intervener.

This is a runner case, and those involved in the alleged accident are the respective parties in this case, wherein summons was filed on 22 January 1997 and the trial commenced on 24 September 1997. As usual in a runner case, a defendant is represented by counsel appointed by the insurance company. In the current case the defendant's counsel was an appointee of Kurnia Insurans (M) Bhd ('Kurnia'). During the trial, counsel for the defendant reported to the insurer that he suspected that the accident never occurred. Kurnia then conducted their own investigations and on 10 January 1998, lodged a police report alleging fraud. The hearing of the plaintiff's case, which began on 24 September 1997, was continued on 17 February 1998, 6 March 1998, 8 June 1998, 29 September 1998, and closed on 9 November 1998. Then, on 14 November 1999 the defendant opened his case and his evidence on the accident was led and completed in examination in chief. Although the police report was lodged on 10 January 1998, it was only on 20 February 1999 that Kurnia filed an application to be made a party — as intervener in the case.

The learned sessions court judge allowed Kurnia's application which led to this appeal. The appellant, who was the plaintiff in the sessions court proceedings, raised several issues in support of his appeal. However, after reading the written submissions and hearing counsel for Kurnia and the plaintiff, I am of the view that there are, in the main, only four issues for my determination. The issues are: firstly, whether the respondent in particular (and other road vehicle insurer generally) could in law, considering the provisions of s 96(1) of the Road Transport Act 1987 ('the Act'), be made a party to the running down proceedings; secondly, whether there has been an inordinate delay on the part of the respondent in filing the application to be added as a party ('intervener') in the proceedings, and if the delay is inordinate, the effect thereof; thirdly, whether such applications, if at all tenable in law, ought to be framed as a prayer that the intervener be added as a co-defendant rather than as intervener; and lastly, whether particulars of fraud would have to be condescended to in an application grounded upon fraud.

Vehicle insurer' rights vis-a-vis s 96(1) of the Act

I shall now deal with the first issue. It is on this entirely novel point that motivated — nay, energize — the parties mutually to seek this court's view. A person ought to be made a party in the proceedings if such person is clothed with issues to be pleaded and litigated. What is meant by issues here could only mean issues as to or affecting liability pertaining to the subject matter being litigated. Therefore, the pith and kernel of the issue that arises for determination is whether, in general, vehicle insurer have issues to be pleaded or litigated before the pronouncement of liability.

Section 96(1) of the Act reads as follows:

(1) If, after a certificate of insurance has been delivered under sub-s (4) of s 91 to the person by whom a policy has been effected, judgment in

> respect of any such liability as is required to be covered by a policy under para (b) of sub-s (1) of s 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

The respondent grounded its application on allegations of fraud. It is trite law that fraud, if proved, constitutes a valid and potent global defence in law against virtually all claims including a claim based on statutory liability such as s 96(1) of the Act, notwithstanding the proviso therein pertaining to avoidance and cancellation of the policy. Nevertheless, what is envisaged from this provision is that judgment must be entered first before the claimant can take any action at all against the insurer, which would enable the insurer to plead fraud. This view is supported by the decision in *QBE Insurance Ltd v Hashim Bin Abdul & Anor* [1981] 2 MLJ 275. In that case Syed Agil Barakbah J (as he then was) had this to say, at p 277, and I quote:

> However, in *Carpenter v Ebblewhite & Ors* [1939] 1 KB 347 the Court of Appeal granted the defendants' application to strike out the plaintiffs' claim as against the insurer for a declaration that they were obliged to satisfy any judgment obtained by the plaintiffs against the defendants in an action for damages for negligence for injuries suffered in a road accident. This was not a third party application but the principle applied was that the liability of the insurer has not arisen before any judgment has been obtained in a dispute between the plaintiffs and the insurer, the court has no power to make a declaration of the insurer's liability.

It is my considered opinion that a vehicle insurer's liability under s 96(1) of the Act is a contingent statutory liability — a liability wholly and exclusively created by statute and contingent upon judgment obtained by the claimant. Thus, during the currency of the proceedings between the claimant and the insured, there are no issues — not even fraud — that could be pleaded or litigated until the strict liability provision under s 96(1) of the Act is triggered into operation upon conclusion of the trial. The insurer's rights are not prejudiced even if they are not, at this stage, allowed to be made a party since they are not at all in law precluded from pleading fraud during the execution stage. It is trite that fraud, if proven, is a good defence even in cases of strict statutory liability situations such as s 96(1) of the Act.

In the English case of *Carpenter v Ebblewhite & Ors* [1939] 1 KB 347, Greeer LJ was, quite rightly, of the view that:

> It seems to me that no dispute can arise between the plaintiffs and the insurance company until after the disposal of the action by the plaintiffs against the defendants Ebblewhite in favour of the plaintiffs and the establishment of a right of indemnity by Ebblewhite against the insurance company.
>
> It would, I think, be wrong and entirely premature to determine in this action, or even in a separate action, at the present time a dispute which has

> never as yet arisen between the parties. A claim by the plaintiffs for a declaration of liability against the insurance company is a claim that ought not to be entertained by the court, because at the time of the claim there was not in existence any dispute between the parties on the only question that can arise between them, whether it be raised in this action or in an independent action.

In *Carpenter*'s case, the plaintiffs who were injured in a collision between their motorcycle and a motorcar claimed, as against the registered owner and the driver, damages for negligence and as against the insurer, a declaration that it was obliged to satisfy any judgment obtained by the plaintiffs against the other two defendants or either of them. The Court of Appeal held that it had no power to make a declaration on liability of the insurer to satisfy a judgment in favour of the plaintiffs against the defendants where no actual dispute between the plaintiffs and the insurer as to that liability had as yet arisen or could arise before such judgment had been obtained.

It would follow that as the liability of a vehicle insurer could be triggered off or set in motion only upon invocation of s 96(1) of the Act by the claimant in a negligence suit at the enforcement stage, it is neither within the province of nor permissible for the court to adjudicate on the status of the insurer's liability (through a finding on fraud) prior to enforcement of the judgment by the successful claimant in the suit; in other words, during the currency of this case, the court below is precluded from adjudicating or making a finding on the issue of fraud until s 96(1) of Act is set in motion.

Thus, in *Gurtner v Circuit* [1968] 1 All ER 328; [1968] QB 587, the insurer was allowed to be added as defendants to the plaintiff's running down action solely because (unlike the position under our Act) the third party liability policy in that case did not give to the insurer a contractual right to conduct the defence of the said action in the name of the assured. Indeed, therein they were allowed to be added as defendants only upon their undertaking to pay to the plaintiff any damages that may be awarded against the defendants — notably, such undertaking would be wholly unnecessary in our jurisdiction in view of s 96(1) of the Act. In *Gurtner*'s case, the insurer predicament under the then English legislation was well expressed by Lord Denning MR as follows (at p 331):

> In pursuance of that order, the plaintiff sent the writ in a letter to the defendant at that address. It, of course, never reached him. The Royal Insurance Co Ltd, did not know his whereabouts any more than anyone else. *They had no authority to enter an appearance on his behalf. Nor had the Motor Insurer's Bureau.* No one had any authority to enter an appearance on his behalf. It looked as if judgment would go against the defendant by default unless something was done. One may ask: why should anyone worry if judgment did go against the defendant by default? The answer is that the Motor Insurer's Bureau had every reason to worry. They had entered into an agreement with the Minister of Transport by which they promised to pay any judgment against a motorist if it was not satisfied by his insurer within seven days. Faced with this obligation, the Bureau were desirous of coming into the

proceedings. They wanted to investigate the plaintiff's claim. They had got the statements of one or two witnesses who said that the plaintiff was himself to blame because he ran across the road. (Emphasis added.)

And his Lordship went on to decide (at p 333), that:

> I would, therefore, allow the appeal. The Motor Insurer's Bureau should be *added as defendants* and be entitled to defend the action and to exercise all the rights of the defendant therein. *The Motor Insurer's Bureau undertake to pay to the plaintiff any damages that may be awarded against the defendant.* (Emphasis added.)

Diplock LJ on the same board and in similar vein, put it rather differently, (at p 336) thus:

> The bureau's legal obligation differs from the statutory obligation of an ordinary insurer under s 207 of the Road Traffic Act 1960, owed to a judgment creditor in a running-down action to satisfy the judgment obtained against the assured, in that the insurer's legal obligation is directly enforceable by the plaintiff in the running-down action, whereas the bureau's legal obligation is not enforceable by the plaintiff himself but is enforceable for his benefit by the Minister who is not a party to the action. Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely 'adjudicated upon' (my italics) unless the rules of natural justice are observed, and all those who will be liable to satisfy the judgment are given an opportunity to be heard. *In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the assured.* As I read his judgment in *Fire, Auto and Marine* [1964] 2 All ER 761; [1964] 2 QB 687, however, John Stephenson J *would have allowed an ordinary insurer to be added as party to a running-down action if the policy of insurance did not contain such a term; and this, I think, would be right.* (Emphasis added.)

Earlier, at p 334 of his judgment, Diplock LJ took great pains to stress and explain why, essentially in the interest of justice, the court had no alternative but to allow the Motor Insurer's Bureau to be made a party, when he said:

> Clearly the bureau have a lively interest, at any rate commercial, in seeing that all proper defences in that action as respects liability are raised and that all relevant material which tends to reduce the quantum of damages recoverable is adduced to the court. We have been informed that in an attempt to mitigate the injustice to the bureau of allowing assessment of damages upon judgments by default to proceed without critical scrutiny, it has been the practice of the Queen's Bench masters, with the acquiescence of plaintiffs, to allow the bureau to be represented at the hearing of the assessment to cross-examine the plaintiff's witnesses and to adduce other evidence. But, save with the consent of the plaintiff, this sensible practice cannot be followed unless the bureau is entitled to be joined as a party to the action, and even where the plaintiff does consent, it is desirable that this formality should be observed — if only to give the bureau a right to appeal or to resist an appeal by the plaintiff.

What is clear from the discussions in the above two cases is that: firstly, vehicle insurer have a right to be made a party to a running down action only when the terms of the policy do not give the insurer a contractual right to conduct the defence in the name of the assured; and secondly, any dispute between the insurer and the plaintiffs pertaining to the insurer statutory liability will only come about after the judgment has been entered; and thirdly, the critical criterion in *Gurtner*'s case is that, the Motor Insurer's Bureau were allowed to enter as co-defendants solely to plead the defendant's case and not their own case — whereas in the instant case, Kurnia had sought to plead their own case against the defendant and plaintiff grounded upon fraud. Without such judgment, Kurnia would seem to have 'jumped the gun' and had filed a premature application 'to intervene'. It is helpful to note that at all stages of the proceedings the respondent's (insurer's) rights are not prejudiced, mindful that s 96(2)(a) of the Act also provides as follows:

> (2) No sum shall be payable by an insurer under sub-s (1) —
> (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings.

Thus, the insurer has a statutory right to be informed of the proceedings right from its inception. Should the plaintiffs fail to give notice of the judgment to the insurer, the insurer need not heed the court's judgment. In fact it was even suggested, per curiam, by Ong CJ in the case of *Johannes Koplan v Aw Chen* [1970] 1 MLJ 220 that (at p 221):

> The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended.

The above statement aptly describes the de facto situation in runner matters. The sole thrust of the respondent's case is that because it has a distinct interest in the outcome of the case it ought to be clothed with a right to enter as a party in the proceedings. Not so, in my view, as its apparent interest in the case is merely contingent and not vested.

Applying the above principles to the present case, it is my judgment that the respondent, as vehicle insurer, could not in law be made a party to the current action. The following points must also be noted: the appellant, as plaintiff in the action had no case to plead against Kurnia; in law, it cannot sue Kurnia until judgment is entered. It would be absurd for Kurnia to be added as a party and to deliver a defence (as prayed for by Kurnia) when Kurnia is yet to be affixed with any liability in the case at hand. What Kurnia ought to have done was to, immediately after claiming knowledge of fraud, apply to amend the defence, and if successful, apply to recall witness by reason of such amendment.

Delay

It is clear from the factual chronology of the case as submitted by the appellant, that Kurnia has not acted bona fide and with due expedition in

its application. On this issue one need only refer to the case of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668, wherein Gopal Sri Ram JCA (in delivering the judgment of the court) at p 673, had this to say:

> In response to the submissions made by En Naban, Tuan Hj Sulaiman, counsel for the first respondent, submitted that it was always open to the applicant to have intervened and have itself added as a party to the substantive motion if it considered itself to be prejudiced by any orders that may be made by the judge in the first respondent's favour. He says, quite correctly, that the applicant had the requisite knowledge and opportunity to take the necessary steps. Counsel submits that the applicant, with full knowledge of its rights, elected not to be an additional respondent to the proceedings and, having made a conscious election, it ought not to be permitted to now change its stance and allowed to play a fuller role.
>
> Continuing with his argument, Hj Sulaiman submitted that it was a matter of discretion and that several factors weighed heavily against the applicant. These included, but were not limited to the following: (1) the applicant's failure to apply at the earliest opportunity to be added as a party; (2) the availability of the alternative course of applying to intervene in the second respondent's appeal, subject, of course, to the exercise of discretion of this court in such event; (3) the delay in coming before us; and (4) the making of a conscious election to make a limited intervention instead of choosing to play the role of an added respondent to the substantive motion.
>
> I think that there is merit in the submission made on behalf of the first respondent. The applicant admittedly did not wish to face an order for costs. Nevertheless, while enjoying that protection, it attacked the first respondent's arguments before the judge. In my view, the applicant was no better than a sniper who, whilst concealed and protected by the foliage in which he hides, proceeds to take pot-shots at his unsuspecting opponent. He was not prepared to take on all the risks of a full battle and, when the event went against him, decided to change his role. Ought he to be permitted to do this? I think not: for both principle and authority are against him.

The authority referred to in *Tradium*'s case was a Privy Council probate case of *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] 3 All ER 559 which applied the principle formulated in *Wycherley v Andrew* (1871) LR 2 P & D 327, and considered it to be of universal application. In *Nana Ofori Atta II*, the Privy Council stated in the following terms:

> There is practice in this court, by which any person having an interest may take himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case. *That principle is founded on justice and common sense, and is acted upon in the courts of equity*, where, if the persons interested are too numerous to be all made parties to the suit, one or two are allowed to represent them; and if it appears to the court that everything has been bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be reopened. (Emphasis added.)

The above principle was also applied in a landlord and tenant case of *Tan Kiaw v Gan Chye Khoon* [1983] 2 MLJ 109, wherein Seah FJ (delivering the judgment of the Federal Court) had this to say:

> According to the record the respondent was cross-examined about the proceedings in the Segamat Magistrate's Court and he replied that not only he had notice and knowledge of them but was present in court during part of the hearing. If he claimed any interest in the premises at No 4, Taman Jementah, Segamat, Johor he ought to have taken reasonable steps by applying to the court to be included as a party to the action in addition to the named defendants, viz Lim Ah Lek and Taplil bin Ithnain, under O 8 r 10 of the Subordinate Courts Rules 1980. He did nothing of the kind but sat back to wait for the outcome of the court action. Learned counsel for the respondent stated from the Bar that when the appellant applied to the learned Magistrate for leave to issue a writ of possession pursuant to O 30 r 3 and O 31 r 4 thereof the respondent attempted to intervene at this stage of the proceedings but the learned magistrate disallowed him from doing so on the grounds, inter alia, that the respondent had received notice of the proceedings as appeared to trial court sufficient to enable him to apply to the court for any relief which he may be entitled (see O 30 r 3(3)), and it was too late in the day to object to the application of the appellant. In our judgment, the learned magistrate came to the correct decision having regard to the abovementioned facts.

It is clear that Kurnia had delayed in making its application to the sessions court. It had allowed over a year to lapse before filing the application to be made 'an intervener' and, a fortiori, after the close of the plaintiff's case. This could probably be construed as a waiver on Kurnia's part. Further, Kurnia would seem to have admitted that there was delay, as it had not offered any riposte or answer to the appellant's submission on that score. As such, this court could not but to hold that there was inordinate delay and that the delay was fatal to the respondent's case.

A further point to note is that the relevant prayer in the application was for leave for Kurnia 'to be made an intervener' in the action. This is fundamentally wrong, as under O 6 r 2(b)(1) of the Rules of the High Court 1980 ('the RHC') one can only apply to be a plaintiff or co-defendant in an action rather than as an intervener. In the case at hand failure to ask to be added as a defendant is fatal and the application must fail on this ground alone (see *Koh Ai Heah (P) v Leeco Realty Sdn Bhd* [1997] MLJ 324).

The Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 791 has advised litigants on the procedure to be adopted when an intervener application is to be made. The correct prayer is that the proposed intervener be *added as a co-defendant* and not as 'intervener'. Further directions are also to be made on the pleadings by the parties including an order that the plaintiff do plead its case against the added co-defendant. This was how it was expressed in *Aik Ming*:

> In any event, when the application came to be made, there ought to have been a prayer in the summons asking for an order that the intervener be added as a co-defendant and for directions on the delivery of pleadings by the parties, including a direction requiring the plaintiffs to plead their case against the added co-defendant.

Therein, the Court of Appeal also reiterated the principles of law applicable to intervener applications as was laid down by the Supreme Court in *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 (at p 151) viz:

> (1) The principle of overriding importance is that all necessary and proper parties, but no others should be before the court at the same time to enable the effectual and complete determination and adjudication to be made by the court of all questions and issues between the parties which arise for decision. (See O 15 r 4 and 6 of the RHC).
>
> (2) To this end, no action will be defeated by reason of mere mis-joinder or non-joinder of any party which is capable of being remedied and is no defence. [See *Abonloff v Oppenheimer* (1882) 30 WR 430].
>
> The joinder of parties is permitted as of right in a wide area of circumstances or otherwise with the leave of the court. (See O 15 r 4 of the RHC).
>
> (3) Additionally, the court has extensive discretionary powers — to add, substitute or strike out parties who are not proper or necessary, and for these purposes the court may even act of its own motion. (See O 15 r 6 of the RHC).
>
> (4) Generally, in common law and chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons whom he has no wish to sue. (See per Wynn-Perry J in *Dollfus Mieg et Compagnie SA v Bank of England* [1951] 1 Ch 33.
>
> (5) Nevertheless, a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention or upon the application of the defendant or in some cases by the court on its own motion. (See Vol 1 *Supreme Court Practice* (1991) at p 193 para 15/6/71].
>
> (6) But, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the latter. (See *Hood-Bars Frampton & Co* (1924) WN 287.) A third party notice is in such a case usually the proper procedure to adopt through such a defendant in a proper case. (See *Dollfus Mieg et Compagnie SA v Bank of England*.)

From the above general principles painstakingly distilled from the rules of court and the authorities thereon by Edgar Joseph Jr SCJ in *Tajjul Ariffin*'s case the particular principles to be adopted in the context of the instant case are: that a plaintiff cannot be forced to pursue his remedy against persons he has no wish to sue; a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the plaintiff; and, all necessary and proper parties, but no others, should be before the court at the same time to enable the effectual and complete determination and adjudication to be made by the court of *all questions and issues between the parties which arise for decision*. It must be pointed out that although *Aik Ming*'s case was reversed on appeal to the Federal Court, this part of the decision in *Aik Ming*'s case was expressly approved in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 at pp 503–504.

Thus, upon the above high authorities, I hold that the respondent was

amiss on procedural law when they applied to the court below to be made 'an intervener in the action'. The respondent's main prayer, which was allowed by the court below, was to be 'an intervener'. Invoking of the court's inherent jurisdiction to make a consequential order which conflicts with this main (unamended) prayer is impermissible and untenable in law as it would be tantamount to backtracking at appellate stage should this court allow amendment to the original prayers in the original application itself.

Lastly, the respondent's impugned application in the court below suffers from yet another infirmity, in that in its supporting affidavit, Kurnia alleged that they believed that the accidents did not take place and that police reports lodged were suspected to be false. What is quite startling is that while reference was made to an investigation, no attempt was made to produce proof of such investigation. Indeed, according to the supporting affidavit deposed to by Mr Lui Soon Oon on behalf of Kurnia, the allegations of fraud was based on talk by kampong people ('orang kampong'). Hence, the belief of the deponent is hearsay, vague and lacks particulars on the allegation of fraud. In this regard, reference must be made to O 41 r 5 of the RHC (O 25 r 26(2) of the SCR). Albeit hearsay statements are admissible in interlocutory proceedings, such statements of information or belief must contain the sources and grounds thereof (see *Mohd Yusof Mohamad v Electrolux Home Centers Sdn Bhd* [1999] 2 CLJ 866 at p 873 and *Dynacast (S) Pte Ltd v Lim Meng Siang & Ors* [1989] 3 MLJ 456 at p 459).

Counsel for the respondent cites three cases in support of its argument that the appellant had not complied with O 41 r 5 of the RHC. With respect, all three cases dealt with waiver of the time period to file affidavits, and are therefore distinguishable for the following reasons: the introduction of hearsay evidence without citing the source of one's information or belief is not an irregularity like time periods which can be amenable to waiver. Delay in filing an affidavit does not go to the root of the affidavit itself i.e. the evidence it contains. Time can always be waived or extended by consent; inadmissible hearsay however is not a mere irregularity but a defect going to the root of the affidavit itself. This cannot be waived by conduct.

He further contended that hearsay evidence is admissible in interlocutory proceedings without the disclosure of 'the sources and grounds thereof' and in support thereof cited the case *Wee Choo Keong v MBF Holdings Bhd and another appeal* [1995] 3 MLJ 549 in which Chong Siew Fai CJ held that (at p 566): 'Although hearsay evidence is admissible in affidavit under O 41 r 5(2) of the RHC, the court should ensure that no injustice results from its admission: *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV & Ors (No 2)* [1998] All ER 975.' Surely, the plain words of that dicta does not sanction a breach of O 41 r 5(2) of the RHC. His Lordship's judgment must be read subject to O 41 r 5(2) of the RHC itself which mandates the clear requirement to also state the deponent's sources of information and belief. It is my view, and I would hold that, 'statements of information or belief' may be used in interlocutory proceedings subject to the mandatory proviso that 'the sources and grounds

thereof' are disclosed. Indeed, in *Wee Chong Keong*'s case the source of information pertaining to that case was in fact stated. The case of *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77, was with respect, wrongly decided. Notably, the learned judge in that case made his decision without any reference to or consideration of the numerous previous decisions that decided that such evidence was inadmissible, namely the following cases: *Hari Singh v Sundaramal* [1965] 2 MLJ 174; *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1986] 1 MLJ 426; *Kassim Bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303; *Wan Othman bin Datuk Wan Yusof v Kewangan Utama (M) Bhd* [1993] 2 CLJ 572 at pp 572–575; *Dynacast (S) Pte Ltd v Lim Meng Siang & Ors* at pp 456–460; and *Teng Suay Ba & Anor v Yeo Kee Aik* [1993] 4 CLJ 95 at pp 95–98.

There is also a further point of trite law that should not escape this court's attention, being that, it is a crucial requirement that the party who alleges fraud must condescend upon specific and sufficient particulars of fraud. This brings to mind the illuminating passages in the judgments of Lord Selbourne LC and Lord Hatherley in *Wallingford v Mutual Society* (1880) 5 App Cas 685. Lord Selbourne said (at p 697):

> With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent.

And, Lord Hatherley further added, at p 701:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be a matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Regrettably, the respondent's application was devoid of any disclosure of particulars on fraud, which makes the application itself untenable.

Consequently, I have to conclude that the respondent's application in the court below was clothed with neither the law nor the merits to be made a party in the proceedings. In my view, the learned judge of the sessions court had exercised his discretion incorrectly under O 8 r 6(2)(b) of the SCR, both on legal principles and on the material available to him in the case, and accordingly I would allow this appeal with costs.

In postlude, I note that the respondent had taken this matter further to the Court of Appeal, without leave of that court but with the enthusiastic

and avid consent of the appellant, for the purpose of securing the appellate court's views on the novel first issue. Obviously, I am ad idem with them, save that in my view, in order to obviate 'a floodgate — situation' hereafter, the court should insist upon compliance with s 68(1)(a) of the Courts of Judicature Act 1964, which makes mandatory, application for leave to appeal in matters such as the current appeal.

Appeal allowed.

Reported by Moy Saw Han